FILED
DEC 14 1949
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

No. 481

OCTOBER TERM, A. D. 1949.

WALTER GUSTAV BEJEUHR,

Petitioner,

v.

EDWARD J. SHAUGHNESSY, District Director, United States Immigration and Naturalization Service at New York, New York,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT OF PETITION.

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BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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To the Honorable Fred M. Vinson, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

Summary Statement of the Matter Involved.

Petitioner seeks a review of the Judgment of Affirmance on November 7, 1949 by the United States Court of Appeals for the Second Circuit, of an order made June 17, 1949 by the United States District Court for the Southern District of New York (per United States District Judge

George Murray Hulbert) dismissing a Writ of Habeas Corpus and remanding petitioner to the custody of the respondent (Record, p. 4).

On June 17, 1949 petitioner appealed to the United States Court of Appeals for the Second Circuit from said order dismissing the Writ of Habeas Corpus (Record, pp. 2, 3). Thereafter, on November 7, 1949 said United States Court of Appeals rendered its opinion, decision and judgment, affirming the order dismissing the Writ of Habeas Corpus (Record, pp. 23 *et seq.)*. An order was made on November 18, 1949, pursuant to Rule 31 of said United States Circuit Court of Appeals for the Second Circuit, staying the issuance of its mandate pending the instant application to this Court.

Petitioner, Walter Gustav Bejeuhr, was born on December 5, 1900 at Hamburg, (Record, fol. 17) then under the jurisdiction of the Imperial German Government. Hamburg is located in Western Germany (in the British zone) and is now under the governmental jurisdiction of the New German Federal Republic. In 1928, the Petitioner legally and duly entered the United States as a quota immigrant, took up permanent residence and since then continuously resided in the United States. He was never charged with, nor convicted of, any crime (Record, fol. 18).

After his arrival in the United States, Petitioner formally and duly renounced his allegiance to any other sovereignty and declared his intention to become a citizen of the United States under the applicable statutes (Record, fol. 18). He thereafter duly and formally applied for naturalization as a citizen of the United States under the applicable statutes, but the proceedings therefor have not been completed.

Shortly prior to May 12, 1942, Petitioner was arrested as an Alien Enemy, allegedly under the provisions of Title

50, Section 21, U. S. Code and Presidential Proclamation No. 2526 of December 8, 1941. On May 12, 1942, the case of Petitioner was considered by an "Alien Enemy Hearing Board" and he was interned by the Order of the Attorney General, dated July 2, 1942 (Record, fol. 20).

On May 10, 1946, Petitioner was accorded a hearing before a "Repatriation Hearing Board," after which, on July 17, 1946, an Order was made by the Attorney General, allegedly pursuant to Presidential Proclamation No. 2655 dated July 14, 1945 (purporting to have been made in accordance with the provisions of Title 50, U. S. Code), directing the Petitioner to depart from the United States within 30 days after notification of said Order, failing which the Commissioner of Immigration and Naturalization was directed to provide for the removal of the Petitioner to Germany (Record, fol. 21).

Thereafter, the Petitioner was notified of said Order of Removal and, apparently in conformity with Section 22, Title 50, U. S. Code, was released from custody for a period of 30 days. Having failed to depart from the United States during said period, the Petitioner was again taken into custody. Thereupon, the Writ of Habeas Corpus at bar was sued out, on December 26, 1946.

On May 17, 1949 argument under the Writ of Habeas Corpus was had before United States District Judge George Murray Hulbert, in the United States District Court for the Southern District of New York. A decision thereon was filed on June 8, 1949, dismissing the Writ of Habeas Corpus and remanding Petitioner to the custody of the Respondent under a ruling that the United States was still at war with Germany (Record, fol. 59). On June 17, 1949, an Order based upon said decision was made and filed and an appeal therefrom was taken on the same day (Record, pp. 4, 2 *et seq.*).

Respondent's Return (Record, pp. 16 *et seq.*) to the Writ of Habeas Corpus (Record, pp. 14 *et seq.*) alleged that the Petitioner was being held in custody as an Alien Enemy, pursuant to the provisions of Title 50, Section 21, U. S. Code and Presidential Proclamation No. 2526 dated December 8, 1941, further asserting that the Petitioner is a native, citizen, denizen or subject of Germany. The Return also alleged that the Attorney General, pursuant to Presidential Proclamation No. 2655, dated July 14, 1945, had made an Order of Removal (Record, fols. 51 *et seq.*) directing Petitioner's removal to Germany.

The Petitioner duly interposed a Traverse (Record, fols. 54 *et seq.*) to said Return denying some of the allegations thereof and alleging that he was being held in custody under and for the purposes of the alleged Removal Order of the Attorney General, which Removal Order was, and is, illegal, void, of no effect, without power or authority and contrary to the provisions of the Constitution and the statutes of the United States.

Petitioner's application to the District Court for a hearing at which to adduce proof and evidence in support of the allegations of his petition and his traverse to the return of the respondent and concerning the issues raised by the pleadings was not granted. No hearing was had in the District Court except for argument by counsel.

II.

Jurisdictional Statement.

It is contended that the Supreme Court has jurisdiction to review the judgment herein in question because the petitioner is being detained and deprived of his liberty under a Removal Order of the Attorney General of the United States made on July 17, 1946, pursuant to the provisions of Title 50 U. S. C. and Presidential Proclamation No. 2655 dated July 14, 1945.

III.

Question Presented.

The question herein presented is:

1. Whether the Removal Order made by the Attorney General of the United States is valid, effective and sufficient to authorize the incarceration of the petitioner and his removal and deportation from the United States under and in view of the provisions of the Constitution of the United States, Title 50, U. S. C., the Treaty of Friendship, Commerce and Consular Rights signed on December 8, 1923 (44 Stat. pt. 3, 2132, Treaty Series No. 725) between the United States and Germany, and despite the actual termination of the war against Western Germany.
2. Whether the order of the District Court dismissing the Writ of Habeas Corpus was properly made without granting petitioner a hearing at which to adduce evidence and proof in support of the allegations of his petition for the Writ of Habeas Corpus, his traverse to the return of the respondent and concerning the issues raised by the pleadings.

IV.

Reasons Relied on for the Allowance of the Writ.

1. That the United States Court of Appeals for the Second Circuit has decided an important question of Federal law, which has not been, but should be, settled by this Court.

2. That the United States Court of Appeals for the Second Circuit has decided a Federal question in a way probably in conflict with the applicable decisions of this Court.

3. That the United States Court of Appeals for the Second Circuit has decided an important question of law in a way probably in conflict with applicable local decisions.

WHEREFORE, your petitioner prays that a Writ of Certiorari issue under the seal of this Court, directed to the United States Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said United States Court of Appeals had in the case numbered and entitled on its docket No. 21446, United States of America on the Relation of Walter Gustav Bejeuhr, relator-appellant, against Edward J. Shaughnessy, District Director, United States Immigration Service at New York, New York, respondent-appellee, to the end that this cause may be reviewed and determined by this Court, as provided for by the statutes of the United States; and that the judgment herein of said United States Court of Appeals for the Second Circuit be reversed by the Court, and for such further relief as to this Court may seem proper.

Dated: December 14th, 1949.

WALTER G. BEJEUHR,
Petitioner,

by: HERMAN L. FALK,
Counsel for Petitioner.

ALEXANDER ACKERSON,
Of Counsel.

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WALTER GUSTAV BEJEUHR,

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v.

EDWARD J. SHAUGHNESSY, District Director, United States Immigration and Naturalization Service at New York, New York,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions of Courts Below.

The opinion of the United States District Court for the Southern District of New York was rendered June 8, 1949 (Record, fol. 49). The opinion of the United States Court of Appeals for the Second Circuit was rendered November 7, 1949 (Record, pp. 23 *et seq.*).

Jurisdiction.

1. The date of the judgment to be reviewed is November 7, 1949.

2. The statutory provision, which is believed to sustain the jurisdiction of this Court is Title 28, Section 1254 U. S. Code.

3. (a) The petitioner is being detained and deprived of his liberty under a Removal Order of the Attorney General of the United States made on July 17, 1946, pursuant to the provisions of Title 50, U. S. C., and Presidential Proclamation No. 2655 dated July 14, 1945 (Record, fol. 48).

(b) The order of the United States District Court for the Southern District of New York dismissing the Writ of Habeas Corpus and the judgment of affirmance by the United States Court of Appeals for the Second Circuit were made without affording or granting the petitioner a hearing at which to adduce proof and evidence in support of the the allegations of his petition and his traverse to the return of the respondent and concerning the issues raised by the pleadings (Record, pp. 5 *et seq.*).

4. The cases believed to sustain said jurisdiction are as follows:

(a) *Ludecke v. Watkins*, 335 U. S. 160;

(b) *Walker v. Johnston*, 312 U. S. 275.

Statement of the Case.

This has already been stated in the preceding petition under I (pp. 1-4), which is hereby adopted and made a part of this brief.

Specification of Errors.

1. The United States Court of Appeals for the Second Circuit erred in holding that the war against Germany had not terminated for at least the purposes of the Enemy Alien Act, (Title 50, U. S. Code).

2. The United States Court of Appeals for the Second Circuit erred in holding that the petitioner is an enemy alien.

3. The United States Court of Appeals for the Second Circuit erred in holding that the petitioner was not entitled to a judicial review of the cause and basis of his detention and attempted removal and deportation, on the merits.

4. The United States Court of Appeals for the Second Circuit erred in holding that the order of the United States District Court for the Southern District of New York dismissing the Writ of Habeas Corpus was properly made without affording and according petitioner a hearing at which to adduce proof and evidence in support of the allegations of his petition and his traverse to the return of the respondent and concerning the issues raised by the pleadings.

ARGUMENT.

Summary of Argument.

Point A—For at least the purposes of the Enemy Alien Act (Title 50, U. S. C.) the war against Western Germany has been ended.

Point B—Petitioner is not an enemy alien.

Point C—Petitioner is entitled to a judicial review of the cause and basis of his detention and attempted removal, on the merits.

Point D—The failure to accord petitioner an opportunity to adduce proof and testimony renders the District Court's order dismissing the Writ of Habeas Corpus and its affirmance by the United States Court of Appeals, improper.

POINT A.

For at least the purposes of the Enemy Alien Act (Title 50, U. S. C.,) the war against Western Germany has been ended.

In dismissing the Writ of Habeas Corpus, the District Court ruled that the United States is still at war with Germany (Record, fol. 59). The Court of Appeals affirmed that ruling (Record, p. 26).

The confirmation by the United States Senate on June 13, 1949 of the Presidential appointment of Honorable John J. McCloy as (Civilian) High Commissioner for Germany (with a rank equivalent to that of Ambassador) (Congressional Record—June 13, 1949, p. 7720) effectively signified that the war against Western Germany had terminated and confirmed its ending. This Congressional action confirms the effects of a series of acts which must be deemed to have ended the war.

That for at least the purposes of the Enemy Alien Act (Title 50, U. S. C.), the war against Western Germany had been terminated, appears conclusively from the text of the West-Bonn Agreement made on November 22, 1949, between the Western Allied High Commissioners and the Chancellor of the West German Federal Republic at Bonn, which, in Article IX, states:

> "The question of the termination of the state of war was discussed. Although such termination may be as consistent with the spirit of this protocol, it presents considerable legal and practical difficulties which need to be examined."

This agreement was made at the behest of the Council of Foreign Ministers composed of the Secretary of State of the United States, and the Foreign Ministers of the United Kingdom and France. One of the Western Allied High

Commissioners participating was Honorable John J. McCloy, whose appointment as United States High Commissioner for Germany had been confirmed by the United States Senate.

For positive and conclusive proof that the war against Western Germany had actually ended, reference is respectfully made to the *ex cathedra* statements of Secretary of State Dean Acheson at his Press Conference held in Washington on December 7, 1949. (See State Department Transcript of Press Conference of Secretary of State Acheson—December 7, 1949.) From such statements, it appears beyond question that the war against Germany had actually and in fact ended, but the formal termination of the technical state of war only awaits solution of complex legal problems and the decisions thereon of the Council of Foreign Ministers respecting the method of such technical and formal termination.

By the "Declaration by the United Nations" of January 1, 1942 between the United States, the United Kingdom (Great Britain), the Union of Soviet Socialist Republics and 23 other nations, the United States pledged itself to cooperate with the signatory governments and not to make a separate armistice or peace with their enemies, which included Germany. (Dept. of State, Publication 1732—Executive Agreement Series 236). The Declaration was signed on January 1, 1945 on behalf of France as an additional party thereto.

The traditionally strict adherence of the United States to its international pledges makes a formal Treaty of Peace with Germany extremely unlikely in the foreseeable future, because of the open, avowed and notoriously unreasonable thwarting and intransigent policy of the Union of Soviet Socialist Republics.

That a war can be terminated without a formal declaration of peace is sound and established international law. The following is a pertinent quotation from Hyde's International Law, Chiefly as Interpreted and Applied by the United States, Second Rev. Ed. Vol. III, Sec. 904, note:

> "Declared Mr. Seward, Secretary of State, in a communication to Mr. Gorri, Spanish Minister, July 22, 1868: 'It is certain that a condition of war can be raised without an authoritative declaration of war, and on the other hand, the situation of peace may be restored by the long suspension of hostilities without a treaty of peace being made. History is full of such occurrences. What period of suspension of war is necessary to justify the presumption of the restoration of peace has never yet been settled, and must in every case be determined with reference to collateral facts and circumstances' (Dip. Co. 1868, II, 32, 34, Moore Dig. VII, 336). For instances of wars so terminated see Fouchille, 8th ed., Sec. 1693; Oppenheim, Lauterpacht's 5th ed., II Sec. 262."

In opposition to the Writ at bar, it was urged in the Court below that the majority opinion of the Supreme Court in *Ludecke v. Watkins,* 335 U. S. 160, was controlling and must be followed. That decision held, upon the record in that case, that "the declared war" with Germany had not ended. That finding is clearly confined to the record presented in that case, for it was recognized by the majority of the Court that a later record might justify a ruling "that a war though merely formally kept alive had in fact ended."

At page 168 *(Ludecke v. Watkins, supra),* the majority opinion stated:

> "• • • The 'state of war' may be terminated by treaty or legislation or Presidential Proclamation. Whatever the mode, its termination is a political act. Whether and when it would be open to this Court to

find that a war though merely formally kept alive had in fact ended is a subject too fraught with gravity even to be adequately formulated when not compelled. * * *."

In Note 13 of the majority opinion in the *Ludecke* case, the following appears:

" * * * But when the life of a statute is defined by the existence of a war, Congress leaves the determination of when a war is concluded to the usual political agencies of the government."

The Supreme Court was sharply divided (5 to 4) in deciding the *Ludecke* case. The dissenting justices contended that a state of war with Germany no longer existed. Again, it is emphasized that the majority ruling as to the existence of the war with Germany must be deemed confined only to the conditions disclosed by the record in that case, since, as demonstrated above, the Court there recognized that a situation justifying a ruling that a war "merely formally kept alive had in fact ended" might be presented in a later case.

Furthermore, by that decision *(Ludecke v. Watkins, supra)*, the Supreme Court also held that a formal war might be terminated in a manner other than by a formal Presidential or Congressional Declaration of Peace or Treaty. It ruled that the end of a formal war might be effected by a political act of the government or its agents.

It is firmly contended that by the political acts herein enumerated, the war with Germany was effectively terminated.

Prior to June 5, 1945, actual hostilities between the United States and its Allies against Germany ceased. (A formal proclamation of the cessation of hostilities as of December 31, 1946 was made by the President by Executive Order No. 2714).

The Berlin Declaration of June 5, 1945 signed by the Allied Representatives, (Dept. of State, Publication 2684, Treaties and other International Acts, Series 1520), provided, in part, as follows:

> "The Governments of the United States, the Union of Soviet Socialist Republics, and the United Kingdom, and the Provisional Government of the French Republic, hereby assume Supreme authority with respect to Germany, including all powers possessed by the German Government, the High Command and any state, municipal, or local government or authority * * *."

The Berlin (Potsdam) Conference between the three heads of the governments of the Union of Soviet Socialist Republics, the United States of America and the United Kingdom took place from July 17th to August 2nd, 1945. It resulted in a Protocol of the Proceedings of the said Berlin Conference (the Potsdam Agreement), dated August 1, 1945. At that conference, there was established a Council of Foreign Ministers composed of the Foreign Ministers of the United Kingdom, the Union of Soviet Socialist Republics, China, France and the United States, to which it was proposed to invite representatives of other governments.

Said (Potsdam Agreement) Protocol, constituting said Council of Foreign Ministers, provided, among other things, in Article I A (3) (i):

> " * * * The Council shall be utilized for the preparation of a peace settlement for Germany to be accepted by the Government of Germany when a government adequate for the purpose is established."

With the defeat of the German Armed forces, the German Government (the Third Reich), against which war was declared was obliterated, became non-existent and ceased

to function. It was replaced and its powers were assumed by the Allies, as signified by the Berlin Declaration of June 5, 1945. When the President of the United States (who must concededly be deemed empowered to act politically on behalf of his government) recognized, by the Protocol of the Berlin Conference, dated August 1, 1945, that a Government of Germany did not exist adequate for the purposes of a peace settlement, he committed the United States politically. He politically recognized the obliteration and non-existence of the German Government (the Third Reich), against which war had been declared, and, by such recognition, effectively signified the end of the war, because the government against which war had been declared had ceased to function and no longer represented Germany.

Pursuant to the aforesaid provisions of the Protocol of the Berlin Conference (the Potsdam Agreement), dated August 1, 1945, the Foreign Ministers of the United States, the United Kingdom, France and the three Benelux countries (Belgium, Netherlands and Luxembourg) as delegates to the London Conference of the Council of Foreign Ministers, on June 2, 1948, issued a Communique (Dept. of State Bulletin, June 20, 1948, pp. 807, *et seq.*—Vol. XVIII, No. 468, Publication 3187) which stated, among other things, (Article III, subdivision A) as follows:

> "Therefore the delegates have agreed to recommend to their governments that the military governors should hold a joint meeting with the Ministers-President of the western zone in Germany. At that meeting the Ministers-President will be authorized to convene a Constituent Assembly in order to prepare a constitution for the approval of the participating states.
>
> "Delegates to this Constituent Assembly will be chosen in each of the states in accordance with procedure and regulations to be determined by the legislative bodies of the individual states.

> "The constitution should be such as to enable the Germans to play their part in bringing to an end the present division of Germany not by the reconstitution of a centralized Reich but by means of a federal form of government which adequately protects the rights of the respective states, and which at the same time provides for adequate central authority and which guarantees the rights and freedoms of the individuals."

Thereafter, the recommendations of the London Conference were adopted, ratified and confirmed by the United States, the United Kingdom and France. Subsequently, at the instance of the Military Governors representing such nations, the German States comprising the zones under the jurisdiction of those powers, elected delegates to a Constituent Assembly which was duly convened at Bonn.

The deliberations of the Bonn Constituent Assembly resulted, on May 8, 1949, in the adoption and approval of a new constitution providing for the creation of a new German Republic. Hamburg, (the birthplace of Petitioner) being in the British Zone, is within the territory subject to the government of the new German Republic.

Within a few days thereafter, as the political representatives of their respective governments, the Military Governors of the United States, the United Kingdom and France approved and ratified the organization of the new German Republic and its constitution.

That the Foreign Ministers, as delegates to the London Conference, (including the Secretary of State of the United States) were political agents of their respective governments empowered to perform binding political acts, must be undisputed. Furthermore, the designation of their respective Military Governors to effectuate their decisions, also constituted the Military Governors as political agents, competent to bind their respective governments politically.

Their (the Military Governors') acts, pursuant to the Communique of the London Conference of June 2, 1948, in arranging and ratifying the election of the delegates to the Constituent Assembly at Bonn and in approving the new constitution, providing for the creation of the new German Republic, were all political acts within the meaning of the above quoted majority opinion of the Supreme Court in *Ludecke v. Watkins, supra.*

The Berlin Declaration of June 5, 1945, in addition to the political acts of the President of the United States at the Berlin Conference, resulting in the Protocol dated August 1, 1945, the various acts of the Secretary of State of the United States, as a delegate to the Council of Foreign Ministers, of the Military Governor of the United States and of the U. S. High Commissioner herein outlined, effectively signified that the war with Germany had been terminated. Any other construction of such actions would be unrealistic and contrary to the facts.

In further confirmation that the war with Germany had ended and to implement the Berlin Declaration of June 5, 1945, the results of the Berlin Conference (as contained in the Protocol dated August 1, 1945, aforementioned), the decisions of the Council of Foreign Ministers at the London Conference, as outlined in the Communique of June 2, 1948, the organization of the Bonn Constituent Assembly and the approval of the Constitution of the new German Republic, the President on June 6, 1949, by Executive Order 10062, established the position of United States (Civilian) High Commissioner for Germany (Federal Register—June 7, 1949, page 2965), with a rank equivalent to that of Ambassador. The nomination of Honorable John J. McCloy as United States High Commissioner for Germany was submitted to the United States Senate by the President on June 7, 1949 (Congressional Record, June 7, 1949, p. 7500).

The Senate confirmed the appointment on June 13, 1949 (Congressional Record, June 13, 1949, p. 7720).

Since then, Commissioner (Ambassador) McCloy has taken the oath of his office and is performing his duties, in Germany.

In establishing the position of United States High Commissioner for Germany (Executive Order 10062, *supra)* in Article 1, the President provided that the "position shall be that of Chief of Mission, Class 1, in accordance with the provisions of the * * * Foreign Service Act of 1946." In Article 2, said Executive Order further provided that the Commissioner shall, among other things, be empowered with "the exercise of proper functions of a Chief of Mission within the meaning of the Foreign Service Act of 1946."

When the Senate confirmed the appointment of Honorable John J. McCloy as United States High Commissioner for Germany, it constituted him an Ambassador to Germany and thereby recognized Germany as now being a nation friendly to the United States. This Senatorial action cannot otherwise be construed than as confirmation of the prior ending of the war against Germany (or, in itself, an effective termination of the war). Ambassadors are not appointed to enemy nations.

Hamburg, the birthplace of Petitioner, is located in the British zone of Germany within the territory under the governmental jurisdiction of the new German Republic.

Further confirming the politically effected termination of the war with Germany and its conversion into a friendly nation, it is significant to note that under the Bonn Constitution of the new German Republic (sponsored and approved by the United States), the territories under its con-

trol (including Hamburg, the birthplace of Relator-Appellant) have democratically selected their representatives to the German National Parliament of the new German Federal Republic and that government is fully functioning. Honorable John J. McCloy must be considered, and duly recognized, as the accredited United States Ambassador to the new German Federal Republic.

To hold that the United States is still at war with Western Germany despite its sponsorship of the democratically organized and functioning new German Federal Republic with a Congressionally approved United States Ambassador accredited to it, would constitute a perversion of the facts.

The Council of Foreign Ministers (composed of the Secretary of State of the United States and the Foreign Ministers of Great Britain and France) met at Paris on November 9th and 10, 1949. Their decisions with respect to Western Germany were transmitted to the Western Allied High Commissioners for Germany (including the United States High Commissioner for Germany) for execution and implementation. In furtherance thereof, the Western Allied High Commissioners and the Chancellor of the West Germany Federal Republic made the agreement on November 22, 1949, in connection with which the question of the formal termination of the technical state of war was discussed, as indicated by the above quoted Article IX of said agreement. This provision recognized that only a technical state of war exists and that the war, though merely formally and technically kept alive, had in fact ended, for at least the purposes of the Enemy Alien Act (Title 50, U. S. C.) Positive and definite substantiation of this condition is found in the statements of Secretary of State Acheson (above referred to) at his Press Conference in Washington on December 7, 1949 when he said that the method of formally terminating the technical state of war

with Germany only awaits the decision of the Council of Foreign Ministers, depending upon the solution of complex legal problems involved. (See Department of State Transcript of Press Conference of Secretary of State Acheson—December 7, 1949.)

The Court of Appeals erroneously held (Record, p. 25) that because of the presence of our military forces in Germany the state of war had not ended. In so ruling, it ignored historical precedents, when the United States, in the absence of a state of war, militarily occupied various Central and South American countries, and China (particularly prior to the Boxer Rebellion) and sent a Punitive Expedition into Mexico under General John J. Pershing.

The war against Germany having been terminated by the political acts of agents of the United States and confirmed by the action of the United States Senate, Germany can no longer be considered inimical to the United States and the Petitioner cannot be deemed to be a native, citizen, denizen or subject of an enemy country or government, nor an enemy alien.

POINT B.

Petitioner is not an enemy alien.

The Petitioner was born on December 5, 1900, at Hamburg (Record, fol. 17), then under the jurisdiction of the Imperial German Government. In 1928 the Petitioner legally entered the United States as a quota immigrant and took up his permanent residence in this country (Record, fol. 18). It must be assumed that his unconcealed and official departure from Germany was with the knowledge, consent and approval of the then German Government. Shortly thereafter, he became an expatriate of Germany, by ra-

nouncing his allegiance to any other sovereignty and by declaring his intention to become a citizen of the United States under Section 731, Title 8, U. S. Code and by virtue of his permanent residence in the United States. In confirmation of his expatriation, he thereafter duly and formally applied for naturalization as a citizen of the United States under Section 732, Title 8, U. S. Code, (which application is still pending).

Because of these facts, it cannot be successfully contended that thereafter Petitioner continued to be a "citizen" or "subject" of Germany. It is therefore presumed that the only ground upon which Respondent seeks to sustain the Attorney General's Order of Removal and the Order dismissing the Writ of Habeas Corpus is the claim that the Petitioner is a "native" of Germany with which the United States is still at war, thus constituting Petitioner an alleged enemy alien.

The Court of Appeals recently ruled in *Bauer v. Watkins* (171 Fed. 2d 492) that under the statute relating to deportation of alien enemies, a person is a "native" of that state or nation in which the place of his birth is at the time of his proposed deportation.

While the Writ at bar was issued on December 26, 1946 (Record, fols. 44 *et seq.)*, its disposition by the District Court was deferred until June 17, 1949, when the order dismissing the Writ of Habeas Corpus was made (Record, p. 4). In the circumstances, the deportation or removal of Petitioner as an alien enemy under the Attorney General's Order of Removal must be deemed to be proposed now.

As has been demonstrated, the German Government (the Third Reich), against which the United States declared war, ceased to exist with the defeat of its armed forces.

Its obliteration was completed by the Berlin Declaration of June 5, 1945 (Dept. of State Bulletin, June 20, 1948, p. 807 *et seq.)* under which the Allies assumed supreme governmental control over Germany. By the Protocol of the Berlin Conference (the Potsdam Agreement), dated August 1, 1945, the President of the United States, politically confirmed such obliteration by recognizing that a peace settlement for Germany could only be accomplished after a government adequate for that purpose was thereafter established.

When the Petitioner was born on December 5, 1900 at Hamburg, that city was under the governmental control and jurisdiction of the Imperial German Government. With the termination of World War I, Hamburg became a part of the Weimar German Republic. Later, he came under the governmental jurisdiction of the Third Reich. With the cessation of World War II hostilities, and particularly since the Berlin Declaration of June 5, 1945 (made before the issuance of the Attorney General's Order of Removal against the Petitioner on July 17, 1946), Hamburg was, until the organization and recognition of the new German Federal Republic, under the governmental control and jurisdiction of Great Britain.

Changes in governmental control and jurisdiction over territories, automatically effect similar changes in nationality and nativity of inhabitants and persons born therein. For instances of such automatic conversions, attention is respectfully directed to the several changes in governments and governmental controls over Alsace-Lorraine, the conversion of France upon freedom from German occupation and the conversion of the Philippines when freed from the Japanese. *(Drewry v. Onassis,* 188 Misc. 912, 69 N. Y. Supp. 2d Ser. 850; aff'd 272 App. Div. 870, 72 N. Y. Supp. 2d Ser. 262.)

Furthermore, the Court of Appeals ruled in *United States ex rel. Schwarzkopf v. Uhl,* (137 Fed. Rep. 2d Ser. 898, 900):

> "* * * If the invaded country has ceased to exist as an independent state there would seem to be all the more reason for allowing its former nationals, who have * * * established a residence abroad, the right of voluntarily electing a new nationality and remaining 'stateless' until they can acquire it."

Aside from any other considerations, since Hamburg was under the governmental control of Great Britain when the Attorney General's Order of Removal was issued against the Petitioner on July 17, 1946, the Petitioner must be deemed to have then been (and to still be) "stateless" (especially because of his prior expatriation) and to be a native of "friendly" or "non-enemy" territory, particularly in view of the previously promulgated Berlin Declaration of June 5, 1945. In any case, the Petitioner cannot be deemed to have been, or to be, an enemy alien or a native of "enemy" territory when the Attorney General's Order of Removal was made on July 17, 1946, or thereafter.

This is especially true because of the sponsorship and formal recognition by the United States of the new German Federal Republic, which has governmental control over Hamburg, the birthplace of Relator-Appellant. By no stretch of the imagination can it be successfully maintained that the Petitioner is a native of territory at war with the United States.

Even if it were pertinent, neither can it be successfully contended that the Relator-Appellant is a "citizen" or "subject" of a country at war with the United States because of the obliteration and non-existence of the Third Reich, against which war was declared (as demonstrated above) and because of the Congressionally approved recog-

nition of the new German Federal Republic. In the circumstances, the Relator-Appellant can in no case be deemed to be an alien enemy of the United States.

POINT C.

Petitioner is entitled to a judicial review of the cause and basis of his detention and attempted removal, on the merits.

Even if it is assumed (but not conceded) that Petitioner is a "national" of a hostile Germany, he is still entitled to a judicial review of the cause and basis of his detention and proposed deportation or removal from the United States. He cannot be deprived of his liberty without "due process of law."

Any attempt to detain, incarcerate, deport or remove (from the United States) any "national" of the United States, is subject to judicial review, on the merits. This proposition is too well settled to require citation of authorities.

When Petitioner legally entered the United States in 1928 and took up his permanent residence, the Treaty of Friendship, Commerce and Consular Rights, signed on December 8, 1923 (44 Stat., pt. 3, 2132, Treaty Series No. 725) was in full force and effect between the United States and Germany. Article I, among other things, provided as follows:

> "The nationals of each High Contracting Party shall enjoy freedom of access to the courts of justice of the other on conforming to the local laws, as well for the prosecution as for the defense of their rights, and in all degrees of jurisdiction established by law.
> "The nationals of each High Contracting Party *shall receive* within the territories of the other, upon submitting to conditions imposed upon its nationals, *the most constant protection and security for their persons*

and property, and shall enjoy in this respect that degree of protection that is required by international law. *Their property shall not be taken without due process of law* and without payment of just compensation." (Emphasis added.)

Thus, the nationals of both the United States and of Germany were guaranteed to have equal rights and they were assured that neither their persons (liberty) or property would be taken without due process of law.

The Petitioner was, and is, entitled to rely upon the provisions of said Treaty, promulgated for his protection. His legal entry into the United States while the Treaty was in effect, gave him the right to consider its provisions a permanent part of his agreement and contract with the United States, under the terms of which he entered the United States and took up his permanent residence.

The provisions of said treaty according the nationals for both contracting parties free access to the Courts is the only basis upon which the District Court could take jurisdiction of the habeas corpus proceeding and under which the United States Court of Appeals had jurisdiction of the appeal from the District Court's order dismissing the Writ of Habeas Corpus. That is also the basis for the instant petition for a Writ of Certiorari. In the Courts below, the respondent made no claim that said Courts were without jurisdiction to entertain the respective proceedings below. It must, therefore, be deemed conceded that the Courts below had jurisdiction of their respective proceedings and that the provisions of the said treaty affording the nationals of both contracting parties equally free access to the Courts, survived the declaration of war. If that provision of said treaty survived the declaration of war, then also the provision giving such nationals the protection of "due process of law" similarily survived the declaration of war.

The Petitioner's right to reside and remain in the United States after his legal entry is a vested property right and he cannot be deprived of the same without due process of law. The applicable provisions of the Treaty were not nullified by the Declaration of War. The right of free access to the Courts of Justice likewise remains in effect and survived the Declaration of War (Hyde's International Law, Chiefly, as Interpreted and Applied by the United States, second rev. ed., Vol. 2, p. 1546, sec. 547 *et seq.;* Hackworth's Digest of International Law, Vol. V, pp. 377-390).

The Petitioner was incarcerated and his deportation and removal from the United States is threatened and impending without "due process of law". No hearing or trial was accorded the Petitioner before any tribunal of competent jurisdiction of the United States. The Petitioner was not apprised of any charges against him, nor was he afforded an opportunity to secure legal aid or counsel, nor to confront and cross-examine witnesses. The absence of any of these essentials accomplished a denial of "due process".

The Enemy Alien Act (50 U. S. C. Sec. 23) provides for proper judicial procedure, which should have been invoked by the Attorney General in the instant case. Thus, there would have been a compliance with the provisions of the Treaty.

Since the Attorney General's Order of Removal against the Petitioner did not result from a judicial review (and decision on the merits) of the cause and basis of his detention and attempted removal, it fails to comply with the solemn obligations of the United States under said Treaty of Friendship, Commerce and Consular Rights. The Petitioner is, therefore, by such judicially unsanctified Order of Removal, being deprived of his rights, liberty and prop-

erty and is about to be deported without that "due process of law" which was provided for his protection.

Said Order of Removal of the Attorney General, therefore, was, and is, illegal, void, of no effect, without power or authority and contrary to the provisions of the Constitution, statutes and treaties of the United Sates.

POINT D.

The failure to accord petitioner an opportunity to adduce proof and testimony renders the District Court's order dismissing the writ of habeas corpus and its affirmance by the United States Court of Appeals, improper.

This Court has held in *Walker v. Johnston,* 312 U. S. 275, that where the petition and traverse on the one hand and the return on the other raise substantial issues of fact, the case must be determined upon a hearing of evidence.

In the District Court and in the United States Court of Appeals it was contended, among other things, that since this Court's decision in *Ludecke v. Watkins,* (335 U. S. 160), political acts of the United States had accomplished a termination of the war with Germany. It was urged that the issues raised by the pleadings should be decided only after the petitioner had a hearing and opportunity to present proof and evidence in support of the allegations of his petition and traverse to the respondent's return and concerning the issues raised by the pleadings (Title 28, Section 2243, U. S. Code). Such a hearing was not granted to the petitioner by the District Court and the failure to grant such an opportunity was approved by the affirmance of the United States Court of Appeals of the order dismissing the Writ of Habeas Corpus.

Even upon this ground, standing alone, it is respectfully urged that the judgment below is improper and should be reversed.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a Writ of Certiorari and thereafter reviewing and reversing said decision and judgment.

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